

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov/)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals
for the Second Circuit, held at the Daniel Patrick Moynihan
United States Courthouse, 500 Pearl Street, in the City of
New York, on the 23rd day of December, two thousand nine.

PRESENT:

ROGER J. MINER,
JOHN M. WALKER, JR.,
REENA RAGGI,
Circuit Judges.

XIU YUE LU,
Petitioner,

v.

08-3433-ag (L) ;
09-0929-ag (Con)
NAC

ERIC H. HOLDER, JR., UNITED STATES
ATTORNEY GENERAL,
Respondent.

FOR PETITIONER: Theodore N. Cox, New York, New York.

FOR RESPONDENT: Tony West, Assistant Attorney

1 **General; Stephen J. Flynn, Assistant**
2 **Director; James A. Hurley, Attorney,**
3 **Office of Immigration Litigation,**
4 **United States Department of Justice,**
5 **Washington, D.C.**
6

7 UPON DUE CONSIDERATION of these consolidated petitions
8 for review of two Board of Immigration Appeals ("BIA")
9 decisions, it is hereby ORDERED, ADJUDGED, AND DECREED, that
10 the petitions for review are DENIED.

11 Petitioner Xiu Yue Lu, a native and citizen of the
12 People's Republic of China, seeks review of the following:
13 (1) the July 3, 2008 order of the BIA denying her first
14 motion to reopen her removal proceedings, *In re Xiu Yue Lu*,
15 No. A076 002 124 (B.I.A. July 3, 2008); and (2) the February
16 26, 2009 order of the BIA denying her second motion to
17 reopen, *In re Xiu Yue Lu*, No. A076 002 124 (B.I.A. Feb. 26,
18 2009). We assume the parties' familiarity with the
19 underlying facts and procedural history in this case.

20 We review the BIA's denial of a motion to reopen for
21 abuse of discretion. See *Kaur v. BIA*, 413 F.3d 232, 233 (2d
22 Cir. 2005) (*per curiam*); *Jin Ming Liu v. Gonzales*, 439 F.3d
23 109, 111 (2d Cir. 2006) (*per curiam*). Upon reviewing the
24 record, we find that the BIA did not abuse its discretion in
25 denying Lu's motions to reopen as untimely because Lu's

1 February and November 2008 motions were filed more than 90
2 days after the BIA entered a final order of removal in April
3 2002. See 8 C.F.R. § 1003.2(c)(2) (providing that an alien
4 seeking to reopen proceedings may file one motion to reopen
5 no later than 90 days after the date on which the final
6 administrative decision was rendered).

7 Furthermore, the BIA did not abuse its discretion in
8 declining to equitably toll the time period for filing Lu's
9 motions to reopen because she failed to demonstrate that she
10 exercised due diligence in pursuing her ineffective
11 assistance of counsel claims. See *Cekic v. INS*, 435 F.3d
12 167, 170 (2d Cir. 2006). In order to warrant equitable
13 tolling of the time period for filing a motion, even
14 assuming that a movant were to demonstrate that prior
15 counsel was ineffective, an alien is required to demonstrate
16 "[the] exercise [of] due diligence" in pursuit of her claims
17 during "both the period of time before the ineffective
18 assistance of counsel was or should have been discovered and
19 the period from that point until the motion to reopen is
20 filed." See *Rashid v. Mukasey*, 533 F.3d 127, 132 (2d Cir.
21 2008).

22 The record shows that Lu has failed to provide
23 sufficient explanation for her lack of action in both (1)

1 the four years between the BIA's April 8, 2002 decision
2 dismissing her appeal and the retention of second counsel in
3 2006 and (2) the time from that point until her first motion
4 to reopen on February 20, 2008. As such, Lu has failed to
5 establish the exercise of due diligence in pursuit of her
6 claims during either the period of time before the
7 ineffective assistance of counsel was discovered or the
8 period from that point until the motion to reopen was filed.
9 *Id.*

10 For the foregoing reasons, these petitions for review
11 are DENIED. As we have completed our review, any stay of
12 removal that the Court previously granted in this petition
13 is VACATED, and any pending motion for a stay of removal in
14 this petition is DISMISSED as moot. Any pending request for
15 oral argument in this petition is DENIED in accordance with
16 Federal Rule of Appellate Procedure 34(a)(2), and Second
17 Circuit Local Rule 34(b).

18 FOR THE COURT:
19 Catherine O'Hagan Wolfe, Clerk
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By: _____